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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000698-MR

AKEEM DONTAE HOWARD-JONES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 15-CR-00170-001

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2016-CA-000835-MR

JAMYCHAEL MICKENS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL JR., JUDGE
ACTION NO. 15-CR-00170-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: MAZE, STUMBO, AND TAYLOR, JUDGES.

STUMBO, JUDGE: In this consolidated appeal, Jamychael Mickens and Akeem Dontae Howard-Jones appeal from Judgments of the Fayette Circuit Court reflecting conditional pleas of guilty to six counts of Criminal Possession of a Forged Instrument, Second Degree. Mickens and Howard-Jones (hereinafter “Appellants”) argue that the circuit court erred in failing to suppress evidence obtained as a result of an unlawful traffic stop. For the reasons stated below, we find no error and AFFIRM the Judgments on appeal.

On November 14, 2014, the Appellants entered a Kroger store located on Richmond Road in Lexington, Kentucky. Kroger employee and loss prevention officer, Corey Blackman, observed Appellants purchasing gift cards utilizing multiple transactions. Blackman was aware of a scheme in which re-encoded credit cards and/or gift cards were used to fraudulently purchase gift cards. The transactions typically were accomplished at u-scan checkout lanes in order to avoid contact with a cashier and included the purchase of another small item. According to Blackman, the actors would often use a rental vehicle to leave the Kroger property in an apparent attempt to conceal their identities.

As Blackman observed Appellants, he noted the purchase of multiple gift cards in separate transactions, along with the purchase of other small items.

Blackman phoned Detective Painter of the Lexington Fayette Urban County Government police department and summoned another loss prevention employee to retrieve a vehicle. Blackman described his suspicions to Detective Painter and gave Painter the license plate number from Appellants' vehicle. Blackman noticed that Appellants' vehicle had a bar code on the back of it indicating that it was a rental vehicle. After Appellants drove away, and based on Blackman's information, Detective Painter authorized a patrol officer to stop Appellants' vehicle.

Officer Dellacamera made the traffic stop of Appellants' vehicle, and Detective Painter arrived on the scene. Dellacamera and Painter made contact with Appellants, and would later testify that Appellant Howard-Jones, who was sitting in the passenger seat, was moving around suspiciously and typing on his cell phone. They described Howard-Jones as initially non-compliant, as he did not roll down his window or open the door as requested by the officers. Appellant Mickens was removed from the vehicle and a *Terry*¹ search was performed, resulting in Painter finding re-encoded gift cards on Mickens' person. Appellant Howard-Jones was then searched and found to be in possession of additional re-encoded credit or gift cards. Mickens consented to a vehicle search, resulting in Painter finding 893 gift cards of which 733 were re-encoded.

Appellants were subsequently arrested and charged with one count of Trafficking in Financial Information, one count of False Making or Embossing of

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Credit or Debit Card, and 101 counts of Criminal Possession of a Forged Instrument, Second Degree. Thereafter, Appellants filed separate Motions to Suppress the evidence found during the traffic stop. In support of the Motions, Appellants argued that the traffic stop was unlawful because there was no reasonable and articulable suspicion justifying the stop. A joint suppression hearing was conducted on September 8, 2015, resulting in Orders denying the Motions. Both Appellants later entered guilty pleas to six counts of Criminal Possession of a Forged Instrument, Second Degree, conditioned on their right to appeal the Orders denying their Motions to Suppress. Appellants then received probated sentences. These appeals followed.

Appellants now argue that the Fayette Circuit Court erred in denying their Motions to Suppress the evidence obtained as a result of the traffic stop. After directing our attention to the protections against warrantless searches set out in the Fourth and Fourteenth Amendments of the United States Constitution and §10 of the Kentucky Constitution, they note that warrantless searches are *per se* unreasonable under Kentucky case law and the Commonwealth has the burden of proving otherwise. Citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998), Mickens argues that in examining a trial court's disposition of a Motion to Suppress, an appellate tribunal must determine if the court's findings of fact are supported by substantial evidence, and then engage in a *de novo* application of the law to the facts.

As applied herein, the focus of Appellants' argument is that their conduct at Kroger did not rise to the level of reasonable suspicion of criminal activity sufficient to justify a traffic stop and *Terry* pat down. When asked by counsel if the facts which formed the basis for suspicion were 1) a gift card, 2) purchased at a u-scan, 3) by two black males driving a rental car, Detective Painter responded "correct". Appellants argue that these facts, taken alone, fall short of demonstrating suspicion of criminal behavior sufficient to support a traffic stop. According to Appellants, Detective Painter's theory would justify a traffic stop for anyone in a rental car who bought a gift card. Appellants also seek to distinguish *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003), upon which the trial court relied, in that the allegation of criminal conduct in *Baltimore* was specific whereas Blackman's allegation against Mickens and Howard-Jones was not. In sum, Appellants maintain that under the totality of the circumstances, the Commonwealth did not establish that Blackman's phone call to Detective Painter was sufficient to establish a reasonable and articulable suspicion justifying a *Terry* stop. They seek an Opinion and Order reversing the circuit court's Orders denying the Motions to Suppress and the suppression of all evidence resulting from the traffic stop.

An appellate court's standard of review of the trial court's decision on a motion to suppress requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's

application of the law to those facts to determine whether its decision is correct as a matter of law.

Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

Law enforcement officers may conduct a traffic stop if it is supported by a reasonable, articulable suspicion of criminal activity. *Bauder v. Commonwealth*, 299 S.W.3d 588, 592 (Ky. 2009).

“[S]topping an automobile and detaining its occupants constitute a ‘seizure’ under the Fourth Amendment.” *Chavies v. Commonwealth*, 354 S.W.3d 103, 108 (Ky. 2011) (citing *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979) (citations omitted)). Traffic stops are similar to *Terry* stops and must be supported by articulable, reasonable suspicion of criminal activity. *Id.* In *Terry v. Ohio*, the United States Supreme Court held that “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). Reasonable suspicion is the lowest tier of the pyramid comprised of probable cause (level two) and preponderance of the evidence (level three): “the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying the preponderance of the evidence standard.” *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

Baker v. Commonwealth, 475 S.W.3d 633, 634 (Ky. App. 2015).

Thus, while a traffic stop and *Terry* search constitute both a seizure under the Fourth Amendment and an intrusion in a practical sense, it does not require probable cause or even satisfaction of the preponderance of the evidence

standard. Rather, the stop is warranted if the officers have 1) a reasonable suspicion of criminal activity based on facts 2) which they can articulate. *Id.*

Based on our review of the record and the law, we conclude that the traffic stop and *Terry* search at issue satisfied the requirements set out in *Baker*. Detective Painter and Officer Dellacamera conducted the stop based on the information provided to them by loss prevention officer Corey Blackman. Blackman was not merely an anonymous tipster, but was known to Detective Painter having worked with him on several occasions previously. Blackman was trained by Kroger to detect and prevent losses, and several customer complaints had alerted him to be on the lookout for individuals engaged in credit card fraud.

In observing Appellants, Blackman noticed that they were using multiple credit cards and gift cards to engage in multiple transactions at the u-scan. This behavior alerted Blackman to the possibility of fraudulent activity, which he reported as it happened to Detective Painter. Additionally, Blackman observed Appellants driving away in a rental vehicle, which Blackman also knew was a characteristic of this type of fraudulent activity as it made it more difficult to identify and locate the actors.

Again, it is noteworthy that in acting on this information, Detective Painter and Officer Dellacamera were not required to possess probable cause nor to satisfy the preponderance of the evidence standard. Rather, they must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry, supra*. Detective Painter

testified as to the specific and articulable facts which formed the basis for the stop. Those facts were communicated to him by a trained and credible witness with direct observation of the apparent criminal activity as it happened. Accordingly, we conclude that the vehicle stop was supported by the facts and the law, and the Fayette Circuit Court properly so found. We find no error.

For the foregoing reasons, we AFFIRM the Judgments of the Fayette Circuit Court.

ALL CONCUR.

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